43420-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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ERIC R. ENGELLAND and CHARLENE C. ENGELLAND,
a marital community,

Appellants,

v.

FIRST HORIZON HOM LOANS, a division of FIRST TENNESSEE BANK NATIONAL ASSOCIATION, a District of Columbia corporation licensed to do business in Washington State, and QUALITY LOAN SERVICE CORP. OF WASHINGTON, a Washington State corporation,

Respondents.

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ON APPEAL FROM KITSAP COUNTY SUPERIOR COURT
(Hon. Anna Laurie)

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# ENGELLANDS' REPLY BRIEF

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## TABLE OF CONTENTS


I. ARGUMENT IN DIRECT REPLY ..... 1

A. The lack of conformity with RCW 2.44.010 of Civil Rule 2A shows that no final agreement exists ..... 1

1. There are genuine issues of whether the Engellands' and First Horizon reached a final agreement ..... 3

2. Examination of the evidence in totality reveals that the three-part test to enforce an agreement is not met ..... 9

B. Equity does not bar the Engellands' challenge ..... 11

C. The Court should reverse the award of attorneys' fees to First Horizon and may award the Engellands' attorneys' fees on appeal ..... 16

II. CONCLUSION ..... 17

## TABLE OF AUTHORITIES

### WASHINGTON CASES

*Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 179
858 P.2d 1110 (1992) ..... 8

*Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 902
83 P.3d 999 (2004) ..... 12

*Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726,
734, 853 P.2d 913 (1993) ..... 12

*Conerstone Equip. Leasing, Inc. v. MacLeod*, 159 Wn. App. 899,
908, 247 P.3d 790 (2011) ..... 14

*Herzog Aluminum, Inc. v. General American Window Corp.*,
39 Wn. App. 188, 692 P.2d 867 (1984) ..... 16

*Loewi v. Long*, 76 Wash. 480, 485, 136 P. 673 (1913) ..... 9

*McKelvey v. American Seafoods*, C99-2108L, 2000 WL
33179292, *1 (W.D. Wash. April 7, 2000) ..... 8

*Morris v. Maks*, 69 Wn. App. 869, 850 P.2d 1357 (1993) ..... 9

### WASHINGTON COURT RULE

CR 2A ..... 1, 2, 3, 6, 9, 17
RAP 18.1 ..... 16
RCW 2.44.010 ..... 1, 3, 6, 9, 17
RCW 4.84.330 ..... 16, 17
RCW 19.36.010 ..... 4

## I. ARGUMENT IN DIRECT REPLY

### A. The lack of conformity with RCW 2.44.010 of Civil Rule 2A shows that no final agreement exists.

This dispute does not concern a mistake of legal effect, or any unexpressed subjective intentions. Rather, this is an effort by First Horizon to force a settlement when there was in fact no final agreement and, further, indisputably, no agreement acknowledged by the parties. There are, however, genuine issues of fact as to whether the parties ever reached a final agreement and whether the absence of an agreement signed in conformity with either RCW 2.44.010[1] or CR 2A[2] evidences the lack of final agreement. If the parties reached a final binding agreement, there would be a document executed by both parties to memorialize the same. Simply put, more than an email communication is required to form a final, legally binding agreement. In particular, more is required to evidence

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[1] RCW 2.44.010 states, "An attorney and counselor h***as authority [t]o bind his or her client in any of the proceedings in an action or special proceeding by his or her agreement duly made or entered upon the minutes of the court***; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding ***unless such agreement or stipulation be made in open court or in presence of the clerk, and entered in the minutes by him or her, or signed by the party*** against whom the same is alleged or his or her attorney..." (Emphasis Added.)

[2] CR 2A provide, "No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court ***unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.***" (Emphasis Added.)

acceptance of a final agreement than an e-mail by the attorney for the Engellands stating that, subject to certain conditions (including revisions and clarifications to agreement at issue), he would produce an agreement signed by the Engellands. *See* CP 175-180.

The parties never signed nor ever purported to sign a final agreement, and both parties recognized the importance of a signed agreement to constitute a final binding agreement. The importance of a signed settlement agreement is noted by First Horizon's counsel Even after the February 27th e-mail, which First Horizon contends is a binding acceptance of the settlement agreement, counsel for First Horizon wrote, "I assumed a signed agreement was forthcoming," CP 141. This e-mail was sent because First Horizon never received any signed writing, which both parties understood necessary to constitute a binding settlement. This intention to have a formal writing to constitute final settlement is further corroborated by earlier e-mails from First Horizon's counsel which indicates the importance of signed loan documents to finalize the settlement:

> I am not positive if a CR 2A agreement would be completely effective in this context given the requirements for binding loan agreements. But hopefully we can move the formal loan documentation and settlement agreement along quickly enough obviate [sic] the need for a CR 2A agreement. If we do end up needing one, we can likely come up with something that works for our purposes.

CP 58.

Furthermore, First Horizon's attorney's February 13, 2013 email communication to Engellands' counsel exemplifies the parties' mutual understanding that signatures were required to create final, binding agreement:

> Chad, we need to get the settlement agreement and loan mod executed this week. Please send me executed copies. Thank you.

CP 129.

Collectively, the correspondence between the parties' counsel demonstrates that the parties understood that without the exchange of signed documents, there was no binding agreement.

The trial court erred when it held that there was an enforceable settlement agreement despite the issues of fact as to whether the parties reached a final agreement. The absence of any agreement in conformity with CR 2A or RCW 2.44.010 not only shows a lack of intention to be bound, but at a minimum creates a genuine issue of fact as to whether the parties intended to be bound.

### 1. There are genuine issues of whether the Engelland's and First Horizon reached a final agreement.

The Engellands do not dispute that an attorney can bind a party. *See* RCW 2.44.010. However, the attorney or the party must *explicitly*

demonstrate that a final binding agreement has been reached. Here, not only is there a lack of evidence to support that a final settlement, but there is evidence to the contrary to show that a final agreement had yet to be reached.

The "Settlement and Release Agreement" expressly provides that "...this Agreement shall not be effective until all of the Settling Parties have signed the Release Agreement, and the various counterparts are delivered to all Settling Parties and/or their respective counsel." CP 246. It is undisputed that the parties did not execute and/or exchange the Release Agreement. Further, "Loan Modification Agreement" and the "Settlement and Release Agreement" cannot be performed in one year, so they fall under Washington's statute of frauds. RCW 19.36.010. Accordingly, unless signed by the Engellands, as "the party to be charged therewith," the agreements "shall be void". *Id.* Thus, under Washington law the agreements at issue are void.

Notwithstanding the statute of frauds issue above, the evidence supports that the Engellands' attorney never made a legally binding promise; therefore, there was never a legally binding settlement between the parties. It is important to note that the Engellands and First Horizon were negotiating the modification of ***two*** loans – one secured by a first position deed of trust and one secured by a second deed of trust. The

parties' agreement regarding these modifications was to be memorialized by *two* documents, a "Loan Modification Agreement" and a "Settlement and Release Agreement". *See* CP 111- 126. While the attorneys for the Engellands and First Horizon were negotiating the final terms of these agreements, they exchanged several e-mails relating to the amount in arrearage, the escrow impound account, and the commencement date under the agreement, which was still only ***two calendar days*** from the date the Engellands received First Horizon's final draft. *See* CP 128. In February 17, 2012 email, Engellands' counsel communicated his clients' questions and/or concerns regarding the aforementioned issues:

> Further to our conversation earlier this week, attached is the January statement my clients received from Nationstar. Regarding my clients concerns with the escrow impound, the attached statement indicates a negative balance. Can you confirm how the negative escrow balance is going to be addressed? Is it being capitalized? Related to the capitalization question, my clients have indicated that they paid for their hazard insurance premium directly but that FHHLC (or Nationstar) advanced the premiums as well. If the escrow balance is being capitalized, can your client provide an escrow statement to clarify what my clients have been charged?
>
> To be clear, my clients are concerned that the escrow balance is not being addressed in the current agreements and that FHHLC or Nationstar will demand payment on the escrow balance (as per the attached) and declare a default even if regular monthly payments are tendered pursuant to the settlement agreement and loan mod agreement. As it stands, neither agreement expressly addresses this issue. I do not think it is unreasonable for my clients to obtain an

> understanding of what their obligations are under the agreement in order to ensure performance.

CP 109.

The parties had not yet intended to be bound by the agreement, and the lack of a formally signed and delivered agreement in conformity with CR 2A or RCW 2.44.010 clearly demonstrates this lack of intention. First Horizon repeatedly cites the February 17, 2012 e-mail in support of the proposition that the parties reached a final agreement. This e-mail, however, does not constitute a final binding agreement, and was not the last conversation between the parties regarding the material issues. The relevant portion of that e-mail provides in full:

> With that said, my clients have authorized me to indicate that they will execute the attached versions of the settlement agreement and loan modification agreement (provided that the settlement agreement dates are updated, e.g. payment to commence 3/1/12) as soon as the negative escrow balance is addressed. In the interest of expediting resolution and anticipating that the escrow balance will be accounted for and addressed in short order by your client, I will have my clients execute a clean version of the settlement agreement (with adjusted dates) and loan modification agreement to be released upon resolution of the above escrow impound issue.
>
> The intent is not to delay but to ensure final resolution of the matter. Given that the agreements provide for payments to commence March 1, we should be able to address the escrow impound item and move forward as contemplated."

CP 109 and 128.

However, subsequent email exchanges between the parties' counsel on February 27, 2012 demonstrates that the issues were unresolved as of February 17, and that the parties had not finalized any agreement. CP 142. The issues that counsel for the Engellands identified as unresolved were not concluded by February 17, and were still unresolved on February 27. An e-mail from the Engelland's counsel later that day stated:

> Ron, I received your voicemail and will contact my clients regarding their signatures on the documents. While I can't promise producing their signatures today, I can promise that I'll get back to you by the end of the day. Thank you for tracking down the answers to my questions on the "New Principal Balance" breakdown. CP 141.

This shows an intention to not yet bind the Engellands, but that the parties understood that until the Engellands signed the loan documents, the settlement was not finalized.[3]

In its Response Brief, First Horizon suggests that the escrow impound and arrearage issue as addressed by the Release Agreement "all arrearages to date shall be capitalized"; however, the Agreement does not provide a breakdown of arrearage being capitalized. Unresolved issues

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[3] The fact that the parties were seeking fully executed documents to constitute final settlement is supported by an e-mail from First Horizon's counsel on February 13, "We need to get the settlement agreement and loan modification executed this week. Please send me the executed copies." CP 110.

between the parties may preclude a finding that a final settlement was reached. The court in *Bryant* did not find an enforceable settlement agreement because the alleged agreement was not stipulated to on the record in open court or memorialized in writing and signed by the party to be bound. *Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 179, 858 P.2d 1110 (1992). The case at hand is more like *Bryant* where the parties planned to get together to finalize the terms of the settlement. Because like here, those parties had agreed to reach a final settlement, pursuant to some remaining terms, the settlement agreement was unenforceable. This case is not like *McKelvey*. In *McKelvey,* there was "no dispute about plaintiff's willing and informed consent to the defendant's counteroffer." *McKelvey v. American Seafoods*, C99-2108L, 2000 WL 33179292, *1 (W.D. Wash. Apr. 7, 2000). McKelvey admitted that the only reason he withdrew his acceptance was because defense counsel's letter made him angry, not because certain as-yet-unnegotiated issues could not be resolved." *Id.* at *2. The Engellands contest whether final acceptance of the settlement was ever reached, and at the point First Horizon tries to insist was settlement, the Engellands still had unresolved concerns, and issues which remained to be negotiated.

### 2. Examination of the evidence in totality reveals that the three-part test to enforce an agreement is not met.

It is important that the parties negotiated modification of two different loans. Settlement of one was not settlement of the other. To bind parties to an agreement, the parties must assent to the same thing at the same time. *Loewi v. Long*, 76 Wash. 480, 485, 136 P. 673 (1913). Despite the requirements of CR 2A and RCW 2.44.010, informal writings may bind a party in some circumstances. To determine whether informal writings can establish a binding contract even though the parties contemplate signing a more formal agreement, the court looks to whether (1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. *Morris v. Maks*, 69 Wn. App. 869, 850 P.2d 1357 (1993) (citing *Lowei*, 76 Wash. at 484). No terms were ever finalized in any writing, and no informal writing binds the parties.

The evidence First Horizon relies upon cannot meet the three criteria set forth in *Lowei* to bind a party by informal writing. While undoubtedly the broad subject matter of these settlement discussions was a loan modification and settlement, the parties did not execute any final agreements on the matter. Subject matter alone is not enough to show that

the parties reached a final settlement. Furthermore, while the parties were negotiating formal writings, the disputed terms were unresolved in the informal writings. The Engellands asked for clarification of terms contained in the formal writings, including a written breakdown of the arrearage. Contrary to the Real Estate Settlement Procedures Act, the Engellands never received a written statement of the arrearage account. Counsel for both parties discussed these disputed terms over the phone, and some disputed terms were resolved. However, the commencement date under the settlement agreement was still disputed, and no formal writing resolves the issue relating to the amounts in arrears.[4]

Most essentially, there is insufficient evidence to support that the Engellands or First Horizon intended to be bound by the writings. The Engellands did not intend to be bound by the agreement because of the unresolved issues. CP 178-180. Additionally, the Engellands did not intend to bind themselves to any agreement that would have placed them immediately in default, as this agreement would have done. CP 179-180.

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[4] Mr. Engelland's March 30th, 2012 declaration conveys the Engellands' concerns over the lack written statement for their escrow account and a March 1st commencement date given the lack of escrow account statement coupled with receipt of revised settlement documents on February 27th. In addition, the Engellands' candidly conveyed that Ms. Engelland had just started aggressive treatment for stage 3 cancer and that her treatment was scheduled to through the following months. Accordingly, they were requesting a June 1, 2012 commencement date.

Likewise, First Horizon did not intend to be bound by the email communication, otherwise would not have continued to seek the more formal writings. On March 12, 2012, counsel for First Horizon wrote:

> As you know, we spoke multiple times on Monday, February 27th. On that day, I answered all of the questions from you and your clients regarding the remaining details of the settlement. You indicated that I had answered all of your questions in our last telephone conversation. You also "promise[d]" in writing to "get back with [me] by the end of the day" on February 27th. You did not. ***I assumed a signed agreement was forthcoming***.

(Emphasis Added.) CP 141.

This e-mail shows that First Horizon understood that the Engellands still needed to provide a signed agreement to demonstrate the mutual intent to be bound by both parties. The evidence and the totality of the circumstances demonstrates that neither party intended to be bound by the settlement agreement, but instead intended for final, formally signed documents in conformity with the statute and court rules to constitute final settlement. Without such documentation, the trial court erred by enforcing the settlement agreement.

**B. Equity does not bar the Engellands' challenge.**

First Horizon asserts that the Engellands are barred in equity from this appeal. This argument is misplaced because First Horizon conflates actions from early in the negotiation process with those at a later time, and

attempts to create bad faith by the Engellands which is unsubstantiated. Equitable estoppel is not favored, and must be proven by clear, cogent, and convincing evidence. *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 734, 853 P.2d 913 (1993). This requires a burden to produce substantial evidence, and a burden to provide persuasive evidence. *Id.* at 735. The party asserting equitable estoppel must provide facts that are clear, positive, and unequivocal in their implication. *Id.* This evidence must prove three element: (1) an admission, act, or statement that is inconsistent with a later claim, (2) another party's reasonable reliance on the admission, act, or statement, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." *Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 902, 83 P.3d 999 (2004). First Horizon argues that the Engelland's dismissal of an earlier interlocutory appeal was an act relied upon by First Horizon that final settlement had been reached, and such reliance has caused injury. First Horizon has not provided substantial evidence to support equitable estoppel, and the evidence produced falls short of persuasive to prove clearly, cogently, and convincingly that the Engellands are barred by equity.

As an initial matter, First Horizon conflates factual circumstances from earlier in the negotiation with the circumstances surrounding the

effort to finalize the settlement. First Horizon contends that the first element of equitable estoppel, "an admission, statement or act inconsistent with a claim afterwards asserted," has been met because the Engellands dismissed their earlier interlocutory appeal. This dismissal, however was not an admission, statement or act inconsistent with the claim now. The earlier interlocutory appeal was dismissed in December 2011. At that time, the parties believed that a settlement could be reached, but recognized that some final issues remained unresolved. That is why the parties engaged in another two months of communications and negotiations after the dismissal. First Horizon cannot argue that this was the admission, statement, or act inconsistent with the Engellands' position that no final settlement was reached. Moreover, First Horizon is not trying to enforce any settlement at the time of the dismissal. Instead, First Horizon has tried to enforce what it believes was a settlement in February 2012, two months later. The fact that First Horizon cannot point to any settlement at the time of the dismissal of the interlocutory appeal shows that there is no admission, statement, or act inconsistent with a claim afterwards. The dismissal of the interlocutory appeal was a statement that the parties believed they could reach a settlement, so long as certain terms were achieved—that is consistent with the Engellands' position now.

Second, First Horizon clearly did not rely on any act, admission, or statement at the time of the dismissal of the interlocutory appeal. First Horizon understood that the dismissal was in light of the progress towards settlement, and the parties' belief that settlement could be achieved. Although First Horizon did not proceed with the foreclosure sale, it did continue to engage in discussions to finalize a settlement. The delay in the foreclosure sale is not due to any reliance on the dismissal of the appeal, but that the parties were working toward settlement. In fact, had the appeal continued, any potential foreclosure proceedings would have been delayed anyway pending the outcome of that appeal. This reliance was not on a statement inconsistent from the Engellands' position. First Horizon relied on the dismissal with the awareness that the parties would finalize the terms of the agreement, which the Engellands were working towards.

Third, First Horizon cannot show any injury. First Horizon was not harmed by any failure to reach a settlement, or the dismissal of the earlier interlocutory appeal sufficient to apply equitable estoppel. An injury cannot be speculative or conclusory to justify equitably estopping a party. *Conerstone Equip.Leasing Inc. v. MacLeod*, 159 Wn. App. 899, 908, 247 P.3d 790 (2011). An argument that the Engellands induced First Horizon to settlement negotiations is not only conclusory, but also misleading.

Reaching a settlement agreement to modify the Engellands' loan is beneficial to both parties. First Horizon engaged in settlement discussions because it has an interest in doing so as well. First Horizon benefits from a loan modification because it guarantees a payment structure on the existing loans. In addition, and importantly, the settlement documents at issue provided for a release of claims concerning the loans. First Horizon did not experience injury during the modification process. The Engellands did not make payments on the loan during the loan modification process because, absent an agreement, First Horizon would not accept anything less payment to bring the loans current. Moreover, First Horizon did not lose any interest in the collateral. First Horizon has experience no injury.

Lastly, the Engellands did not "disavow to agree[5]" to the settlement, but instead asked First Horizon to clarify several issues and change the payment date so that they would not be in default of the agreement when they signed it. On multiple occasions, and particularly in February 2012, First Horizon provided versions of the settlement agreement that would require the Engellands to review, accept, and commence payment within as little as 72 hours after receipt. The Engellands concerns regarding time and the other terms of the agreement

was not a bad faith effort to delay settlement, nor was it any representation that First Horizon could reasonably rely upon to their injury. There is not any substantial evidence that the Engellands made a statement, act, or admission upon which First Horizon relied upon, and which therefore caused injury. The Engellands should not be equitably estopped from disputing the existence of a settlement agreement.

### C. The Court should reverse the award of attorneys' fees to First Horizon and may award Engellands' attorneys' fees on appeal.

The prevailing party in an action on a contract may recover attorneys' fees and costs. RCW 4.84.330. Parties may further recover fees under RAP 18.1 if applicable law grants the right to recover these fees. The Engellands consistently argue that the trial court erred granting First Horizon's fees because First Horizon should not have prevailed below, and their position that they are entitled to fees on appeal is not novel. Washington courts have interpreted "an action on a contract" to permit the recovery of fees even when the court does not enforce the contract. *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984). In Herzog, the court awarded attorneys' fees to

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[5] Interestingly, on one hand First Horizon tries to characterize this as an effort by the Engellands to avoid settlement in the same effort to enforce a settlement.

the party who prevailed by successfully defending a breach of contract lawsuit by proving the absence of an enforceable contract. *Id.* at 197. The broad language of RCW 4.84.330 permits the award of attorney fees to the party who prevails in any action where it is alleged that a person is liable on a contract. Applied here, because the settlement agreement First Horizon seeks to enforce has a provision for fees, attorneys' fees are awardable to the prevailing party. The Engellands should have prevailed at the trial court because there was no enforceable contract—the parties never reached a final settlement. Therefore, because the Engellands should have successfully defended against the contract in the court below, this Court can award attorneys' fees to the Engellands as the prevailing parties.

## II. CONCLUSION

For the reasons set forth herein, the Engellands respectfully request this Court to reverse the trial court's order enforcing the settlement agreement on the basis that a final agreement was never reached, or memorialized in accordance with CR 2A or RCW 2.44.010.

Respectfully submitted this 9th day of October, 2013.

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By: _____
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## CERTIFICATE OF SERVICE

I certify that on the 9th day of October, 2013, I caused a true and correct copy of ENGELLANDS' REPLY BRIEF to be served on the following via email and first-class mail as indicated below:

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